No. 91-1326

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE DISTRICT OF COLUMBIA
AND SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF

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INTRODUCTION

Throughout this litigation, the District of Columbia has taken the position that its Equity Amendment Act is no different for ERISA purposes from the Disability Benefits Law that withstood an ERISA preemption attack in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). The District had interpreted *Shaw* as mandating a two-step approach to ERISA preemption for state laws governing matters such as employee disability benefits and workers' compensation:

[1] Other briefs filed in this case are cited as follows: Brief for Petitioners (D.C. Br.); Brief for Respondent (Board of Trade Br.); Brief of the American Association of Retired Persons (AARP Br.); Brief of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO Br.); Brief of the State of Oklahoma, *et al.* (Okla. Br.); Brief for the United States (U.S. Br.); Brief of the Chamber of Commerce of the United States (Chamber of Commerce Br.); Brief of the District of Columbia Insurance Federation, *et al.* (Ins. Br.); and Brief of the Connecticut Business and Industry Association (CBIA Br.).

(1) whether the state law "relates to" ERISA-covered plans, and (2) if so, whether an employer can meet its state-law obligations by establishing an employee benefit plan separate from its ERISA-covered plan. The District had also taken this Court at its word — *Shaw* is a case in which this Court "held that . . . the State's Disability Benefits Law 'relate[d]' to welfare plans governed by ERISA," but nevertheless found it not preempted because employers could satisfy the state law by establishing a plan separate from their ERISA-covered plans. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

Despite *Shaw* and *Metropolitan Life*, the court below ruled that the Disability Benefits Law in *Shaw* did not relate to ERISA-covered plans; that the District's Equity Amendment Act does relate to such plans; and that, as a consequence, *Shaw* does not require a ruling that the Equity Amendment Act is outside the scope of the ERISA preemption provision.

The issue the District presented in its Petition for a Writ of Certiorari is whether the Equity Amendment Act is different for ERISA purposes from the Disability Benefits Law in *Shaw*. Cert. Pet. i. It has urged that the Act is not, on two alternative grounds.

First, the District has urged, based on *Shaw* and *Metropolitan Life*, that, because of the breadth of the definition of employee welfare benefit plan contained in ERISA, disability benefit laws and workers' compensation laws will always relate to ERISA-covered plans, but that they are nevertheless not preempted by ERISA so long as an employer can comply with such laws by establishing an employee benefit plan separate from its ERISA-covered plan and such laws do not otherwise offend ERISA.

ERISA defines an employee welfare benefit plan as "any plan . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . .." ERISA § 3(1), 29 U.S.C. § 1002(1). Such plans are governed by ERISA unless they are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws . . .." ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3). Given the breadth of the definition of ERISA-covered employee welfare benefit plans, state disability or workers' compensation laws are bound to have some connection with such plans and thus relate to such plans. Indeed, without the exception in section 4(b)(3), all workers' compensation plans maintained by employers, who satisfy ERISA's interstate commerce requirement, would be subject to ERISA. Here, there is no dispute that an employer can comply with the Equity Amendment Act by maintaining a plan solely for that purpose or by amending its ERISA-exempt workers' compensation plan to provide the additional workers' compensation benefits required by the Act.

Second, and in view of the surprising ruling of the court below that the Disability Benefits Law in *Shaw* did not relate to ERISA-covered plans, a ruling that contradicts this Court's description of *Shaw* in *Metropolitan Life* and conflicts with the ruling of the Second Circuit in *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991), the District has made an alternative argument. If the court below is correct that the Disability Benefits Law did not relate to ERISA-covered plans, neither does the District's Equity Amendment Act and, like the law in *Shaw*, it is not preempted by ERISA.[2]

[2] In view of the foregoing, cases like *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), do not preclude the District from making the alternative argument in support of its claim that ERISA does not preempt its Equity Amendment Act. Indeed, *Yee* expressly permits a litigant in this Court to make "separate *arguments* in support of a single claim . . .." *Id.* at 1532 (emphasis supplied by this Court). As this Court stated in *Yee*, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* Here, the District's claim is that its Equity Amendment Act is not preempted by ERISA, and it has offered two arguments in support of that claim.

Nor has the District waived its alternative argument. First, the District was entitled to take this Court at its word that the Disability Benefit Laws in *Shaw* related to ERISA-covered plans but was never-

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ARGUMENT

I. THE EQUITY AMENDMENT ACT IS A WORKERS' COMPENSATION LAW THAT REFLECTS THE GROWING IMPORTANCE OF HEALTH BENEFITS IN AN EMPLOYEE'S COMPENSATION PACKAGE.

The insurance company amici urge, and the United States suggests, that the Equity Amendment Act is preempted by ERISA either because it is not really a workers' compensation law and/or because it is innovative. According to the insurance company amici, "[b]y loading a health insurance benefit onto a workers' compensation law," the Equity Amendment Act cannot "be considered a 'workers' compensation law' " and "by limiting its reach to employees who already participate in employer-paid health insurance, the Act does violence to a cardinal principle that has informed workers' compensation statutes since the first one enacted in 1910: that they protect all employees of all covered employers." Ins. Br. 19. The United States, in turn, suggests that Congress, in enacting ERISA, meant to permit only traditional provisions in workers' compensation laws by its

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theless not preempted, and it was not required to anticipate the D.C. Circuit's contrary ruling. Second, although the court below mentioned that the District did "not dispute that the Equity Amendment Act 'relates to' an ERISA-covered employee benefit plan," (Cert. Pet. App. 11a) the court below made an independent ruling on that matter. Cert. Pet. App. 11a-19a. That independent ruling, the bases for that ruling, and the consequences that flow from that ruling, are reviewable here. In construing a statute as complex as ERISA and in resolving a conflict among the Circuits concerning the meaning of ERISA, this Court surely is not bound by a construction of ERISA offered by a party below based on its understanding of this Court's jurisprudence. Third, even if the District had not raised its alternative argument here, this Court, to ensure that a statute as important as ERISA is properly applied by the lower courts, could have *sua sponte* construed ERISA in accordance with that alternative argument; ruled that both the Second and the District of Columbia Circuits erred in interpreting *Shaw*; and applied the proper construction of ERISA to this case. *See, e.g., Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4708 (U.S. June 23, 1992) (rejecting construction of two federal statutes urged by both petitioner and respondents); *Arcadia v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990) (declining to reach the issues decided by court below and argued in this Court in view of this Court's independent construction of the federal statute at issue in the case).

acknowledgement that "[t]here is no doubt that Section 4(b)(3) [of ERISA] embodies Congress's intent to leave intact *traditional state regulation*" of workers' compensation matters. U.S. Br. 19 (emphasis added).

These arguments are flawed. First, as this Court has acknowledged, " 'modern wage payment practices' " have increasingly been affected by employer-paid fringe benefits, including health insurance, and a legislature may properly take such practices into account in defining compensation in workers' compensation and other laws. *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 632-33 (1983).[3] Increasingly, many, but not all, workers have foregone higher wages in exchange for such employer-paid benefits. *Id.* at 636.[4] The Equity Amendment Act, therefore, far from violating a cardinal principle of workers' compensation statutes, is fully consistent with that principle — the Act seeks to protect the compensation expectations of "all employees of all covered employers," whether they are compensated solely by wages or whether part of their compensation is health insurance in lieu of wages.[5]

[3] In *Morrison-Knudsen*, this Court declined to construe the term "wages" in a federal workers' compensation law to include the value of fringe benefits, but it clearly did not preclude Congress from doing so. On the contrary, this Court stated that defining compensation in a federal law is "a task for Congress" and observed that Congress had expressly enacted a broad definition of compensation to include the value of employee benefits in other legislation. 461 U.S. at 636. Just as Congress is the appropriate legislature to define "compensation" in a federal workers' compensation law, the Council of the District of Columbia is the appropriate legislature to define that term for its workers' compensation law, as are the state legislatures for their own workers' compensation laws.

[4] At the time of this Court's 1983 decision in *Morrison-Knudsen*, benefits constituted over 15% of compensation costs and there were projections that such benefits "could easily constitute more than one-third of labor costs by the middle of the next century." 461 U.S. at 636. These projections appear to have been modest. As the American Association for Retired Persons notes, by 1990, "the percentage of compensation provided through benefits" amounted "to over 27 percent of payroll." AARP Br. 5.

[5] Nor is the District alone in seeking to conform its workers' compensation law to reflect modern compensation practices. See AARP Br. 6-7. Furthermore, the Equity Amendment Act is consistent with the basic
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Second, this Court has squarely and properly rejected the argument that Congress, by enacting ERISA, intended to bar innovative state responses to changing social and economic problems. *Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, 471 U.S. at 741. This Court has stated that it "must presume that Congress did not intend to pre-empt *areas* of traditional state regulation." *Id.* at 740 (emphasis added). As a consequence, Congress, in enacting ERISA, did not intend "to leave intact [only] traditional state regulation." (U.S. Br. 19) but intended to permit states to regulate as they deem wise "areas" in which they traditionally have regulated, including insurance and workers' compensation.[6]

Third, the United States and the insurance company amici have attempted to erect a false dichotomy between workers' compensation benefits (or benefits in the event of work-related "sickness, accident, [or] disability") and health benefits (or "medical, surgical, or hospital care or benefits").[7] ERISA

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trade-off made in workers' compensation laws — employees give up their right to bring a common law tort action against their employers for work-related injuries in exchange for the right to receive promptly fair and reasonable workers' compensation benefits paid for by their employers. The Board of Trade and several of its amici admit that, if a state were to abolish its workers' compensation system and revert to a common law tort model, an employee injured on the job could, in a tort action against his employer, recover not only lost wages and the medical costs of treating his injury but also the value of benefits, such as health insurance, lost as a result of his work-related injury. Board of Trade Br. 34-35; U.S. Br. 15-16; CBIA Br. 3-4.

[6] Indeed, Congress seems to have intended to allow the states to be innovative. As the United States noted in its brief in *Shaw*, "New York is one of [only] five states that require employers to provide disability benefits in addition to comprehensive workers' compensation benefits." Brief for the United States As Amicus Curiae Supporting Affirmance 5 n.2 in *Werner H. Kramarsky v. Delta Air Lines, Inc.*, No. 81-1578.

[7] See U.S. Br. 3 (quoting only that part of § 3(1) of ERISA referring to "medical, surgical, or hospital care or benefits") and 21 n.11 (quoting only that part of § 3(1) referring to "benefits in the event of sickness, accident, disability . . . or unemployment." The United States also asserts that Congress's use of the phrase "*solely* for the purpose" in section 4(b)(3) "evidences Congress's intent that plans that are maintained for both exempt (*i.e.*, workers' compensation) and non-exempt (*e.g.*, health

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§ 3(1), 29 U.S.C. § 1002(1). There is no sharp line between benefits in the event of work-related injury, on the one hand, and medical benefits and the like, on the other. *Cf. Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, 471 U.S. at 741 (rejecting argument that ERISA sharply distinguishes between "health laws" and "insurance laws"). Indeed, workers' compensation laws throughout the country traditionally have required employers to pay the medical benefits necessary to take care of work-related injuries. 1 A. Larson, Workmen's Compensation Law, § 1.00 (1992). The medical benefits mandated by the Equity Amendment Act are also benefits required only in the event of work-related illness, injury, or death. And while such benefits are required only for employees who otherwise receive such benefits from their employers as active employees — to replace one aspect of the compensation they would have received as active employees — the fact that an employer may not have had a worker's compensation purpose in providing this form of compensation in the first instance does not negate or undermine the District's workers' compensation purpose in enacting the Equity Amendment Act. Just because an employer does not have a workers' compensa tion purpose in paying wages does not mean that the District does not have a workers' compensation purpose in replacing wages lost when workers are injured on the job. l A. Larson, Workmen's Compensation Law, § 1.00 (1992).

In short, despite the fact that the Equity Amendment Act is nevertheless a workers' compensation law,

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benefit) purposes are covered by ERISA." U.S. Br. 19 (emphasis supplied by U.S.). The relevance of this assertion to this case is unclear. Certainly, under *Shaw*, an employee welfare benefits plan that includes benefits required both by a state workers' compensation law and other employee benefits is governed by ERISA. However, as *Shaw* also holds, employers may not escape their state-law obligations by combining workers' compensation benefits with other benefits in a single plan, as employers are now attempting to do. See Okla. Br. 1-7. Under *Shaw*, a state may require employers to establish a separate plan to provide benefits mandated by its workers' compensation law, and, in the District's view, that plan may include not only health benefits for on-the-job injuries but also other health benefits lost as a result of those injuries.

designed to replace the compensation a worker would have received but for his work-related illness or injury. As such, there is a presumption that it is not preempted by ERISA.

II. THE EQUITY AMENDMENT ACT IS NOT PREEMPTED BY ERISA.

A. The Equity Amendment Act Does Not Differ For ERISA Purposes From The Clearly Permissible Law Approved By The Court Below.

The court below ruled that, "[h]ad the Equity Amendment Act related only to the workers' compensation plan — had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation — it would clearly have survived preemption under the principles announced in *Shaw*." Cert. Pet. App. 12a. The Board of Trade concedes the validity of this ruling here. (Board of Trade Br. i) but the United States suggests that, even if the law approved by the court below may not be struck down because it is innovative, it may nevertheless run afoul of ERISA, as amended by COBRA. U.S. Br. 15, 17, 21-24. See *infra* at 12-17.

For the reasons that follow, however, the Equity Amendment Act no more relates to ERISA-covered plans than the "free-standing" law approved by the court below. First, the Equity Amendment Act does not expressly refer to ERISA-covered *plans*, as the D.C. Circuit ruled (Cert. Pet. App. 12a), and does not single them out for special treatment. Instead, the Act merely imposes on "[a]ny employer who provides health insurance coverage" to their active employees an obligation to provide "equivalent" coverage to their employees who are eligible to receive workers' compensation. D.C. Code Ann. § 36-307(a-1) (1991 supp.). The Act applies to employers, including the District of Columbia and churches, which are exempt from ERISA. See D.C. Br. 3 n.1, 6 n.5; D.C. Code Ann. § 1-624.3 (1991 supp.) (coverage of

District employees).[8] The fact that the Act expressly applies to employers who provide benefits, and not to ERISA-covered plans, is a point either ignored or minimized by the Board of Trade and the amici supporting it.[9] The fact of the matter is, however, that section 514(a) of ERISA, 29 U.S.C. § 1144(a), is directed at state laws only "insofar" as they "relate to any employee benefit *plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title." (Emphasis added.)[10] Furthermore, this Court has rejected the argument "that any state law pertaining to a type of employee benefit listed in ERISA necessarily

[8] The insurance company amici suggest that the Equity Amendment Act does not apply to employers in the District who self-insure to meet their workers' compensation obligations. See Ins. Br. 7. This suggestion is erroneous. The Act applies to all employers in the District, not merely those which meet their workers' compensation obligations by purchasing insurance.

[9] By contrast, the United States in *Shaw* (see *supra* at 6 note 6) pointed out: "Although the New York statute is unenforceable against the *plan*, the New York authorities may hold the *employer* responsible for complying with the state disability benefits law since there is available a plan structure that would be excluded from ERISA coverage." U.S. *Kramarsky* Br. 21 (emphasis in original).

[10] The District has long had a provision in its workers' compensation law that does expressly refer to ERISA-covered plans. This provision permits employers to coordinate benefits paid pursuant to their ERISA-covered plans with benefits paid pursuant to the District's workers compensation law, and thereby reduce the benefits that would be payable without this provision. D.C. Code Ann. § 36-308(9) (1981 ed. 1988 repl.) provides:

> In no event shall the total money allowance payable to an employee . . .: (1) As compensation for an injury . . . under this chapter . . . and (3) from *employee benefit plans subject to the Employee Retirement Income Security Act* . . . exceed in the aggregate the higher of 80 percent of the employee's weekly wage or the total of federal payments and *employee benefit plans payments*.

(Emphasis added). Despite the fact that this provision expressly refers to ERISA-covered plans and determines the level of benefits payable under the District's workers' compensation law by reference to benefits payable pursuant to ERISA-covered plans, no employer in the District, including the Board of Trade, has suggested that this provision is preempted by ERISA. Under the Board of Trade's test, however — that workers' compensation laws relate to ERISA-covered plans and therefore are preempted whenever benefit levels are set by reference to ERISA-covered plans — this provision would be preempted. Board of Trade Br. i, 16, 34.

regulates an employee benefit plan, and therefore must be preempted." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7 (1987). The language of the Equity Amendment Act, therefore, does not run afoul of ERISA. It merely requires health-care benefits as part of workers' compensation if employers provide such benefits to active workers irrespective of whether they do so pursuant to ERISA-covered or ERISA-exempt plans. Indeed, had ERISA never been enacted, the impact of the Equity Amendment Act on employers in the District would not differ at all.

The court below ruled that the Equity Amendment Act relates to ERISA-covered plans, not because it requires benefits of the type that would be included in ERISA-covered plans if provided voluntarily by an employer subject to ERISA, nor because it requires health-care benefits, but merely because of the method the Act adopts for establishing eligibility for such benefits and the level of benefits to be provided. The court below ruled that the Act impermissibly relates to ERISA-covered plans because "every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect that such a change would have on its unique obligations to its District employees receiving workers' compensation." Cert. Pet. App. 17a. Thus, the court below ruled that the Equity Amendment Act may discourage some employers from providing health insurance for active workers in their ERISA-covered plans and may cause other employers who do provide such benefits to reduce them. Cert. Pet. App. 17a. The court below was also concerned with subjecting employers with ERISA-covered plans to differing state workers' compensation requirements. Cert. Pet. App. 17a-18a.

ERISA, however, does not preempt state laws merely because they increase an employer's cost of doing business and may, therefore, affect an employer's decision whether to provide employee benefits and at what level. Indeed, even the statute which the court below ruled "would clearly have survived preemption under the principles announced in *Shaw*" (Cert. Pet. App. 12a) would likely have such an impact on employer decisionmaking. Should the District of Columbia, or a state, enact such a statute, and thereby impose greater workers' compensation costs on employers, those costs may cause employers to refrain from providing voluntarily health insurance (or other benefits) in their ERISA-covered employee benefit plans or to reduce benefits provided under such plans.[11] For example, had the District decided that the benefits contained in the Board of Trade's ERISA-covered plan constituted a reasonable level of benefits for all injured workers in the District, the Board of Trade would face the same additional costs of doing business it faces under the Equity Amendment Act.

Finally, it is plain that the court below erred in striking down the Equity Amendment Act because the Act imposes workers' compensation administrative obligations on employers that differ from those of other jurisdictions. See *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (state laws permitting creditors of ERISA-plan beneficiaries to garnish plan benefits do not offend ERISA despite the obvious costs imposed on plans by such laws). As the United States has stated, moreover, Congress, by enacting section 4(b)(3), "expressed its tolerance for resulting inconsistencies in state laws" governing workers' compensation, disability insurance, and unemployment compensation laws. U.S. Br. 19. In short, there is no difference, from the standpoint of ERISA, between the Equity Amendment Act and the workers' compensation law approved by the court below.[12] See also D.C. Br. 18-37; AFL-CIO Br. 5-30.

[11] Employers may also take steps to improve safety in the workplace (and health and safety generally) in order to reduce or eliminate whatever additional costs they may otherwise incur under an improved workers' compensation law.

[12] The insurance company amici assert that the Equity Amendment Act is somehow invalid because they are not "likely" to be able to write insurance policies to comply with it. Ins. Co. Br. 14. This assertion is irrelevant. First, the Board of Trade has not suggested that it cannot comply with the Act. Second, the other amici briefs filed in support of the Board of Trade, particularly that of the Connecticut Business and Industry Association, whose members are subject to the Connecticut statute on which the Equity Amendment Act is modeled, demonstrate that employers can comply and are complying with such a statute. CBIA Br. 2. This assertion is also suspect because employers can, and have been, complying with other provisions similar in concept to the Equity Amendment Act, such as COBRA and state continuation-of-coverage laws. See *infra* at 12-17.

B. COBRA, When Conjoined With ERISA, Does Not Require Preemption.

COBRA[13] represents a very modest attempt by Congress to establish a health-insurance safety net for designated employees.[14] In simplified form, COBRA requires employers, which have 20 or more employees and which provide health insurance to these employees, to give their employees an opportunity to continue this insurance for 18 or 36 months after designated qualifying events. COBRA §§ 601(b), 602(2), 603, 29 U.S.C. §§ 1161(b), 1162(2), 1163. The term "qualifying event" includes a number of "events which, *but for the coverage required under this part*, would result in the loss of [health insurance] coverage of a qualified beneficiary . . .." COBRA § 603, 29 U.S.C. § 1163 (emphasis added). These events include the death of a covered employee; the "termination (other than by reason of such employee's gross misconduct), or reduction of hours, of the covered employee's employment;" and the covered employee becoming entitled to Medicare benefits as a result of a serious and permanent disability. COBRA § 603, 29 U.S.C.§ 1163.[15]

[13] Consolidated Omnibus Budget Reconciliation Act of 1985, Tit. X, Pub. L. No. 99-272, § 10002(a), 100 Stat. 227, codified at 29 U.S.C. §§ 1161-1168. COBRA is an amendment of ERISA and thus part of ERISA. For clarity, however, the District cites ERISA to refer to the pre-COBRA portions of this legislation and COBRA to refer to the amendment.

[14] See Somers, *COBRA: An Incremental Approach to National Health Insurance*, 5 J. Contemp. Health L. & Policy 141 (1989)

[15] The United States asserts (U.S. Br. 15) that all employees receiving workers' compensation are eligible to elect COBRA benefits. The accuracy of this assertion is far from clear. First, as noted, COBRA applies only to employers with 20 or more employees while the District's workers' compensation law applies to virtually all employers in the District. Second, the qualifying events covered by COBRA that are most akin to those also covered by workers' compensation are death or a serious and permanent disability. Workers' compensation laws, however, cover a broader range of work-related injuries and illnesses. These other injuries or illnesses would not be covered by COBRA unless the qualifying event, "reduction of hours," covers them, but the United States cites no authority to support such a definition.

On this point, the District notes one other matter. The United States seeks to distinguish *Shaw* in part on the ground that COBRA does not

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COBRA permits, but does not require, employers to shift the entire cost of such continuation insurance, including administrative expenses, to persons who elect to continue coverage. COBRA § 602(3)(A), 29 U.S.C. § 1162(3)(A). COBRA benefits, therefore, are merely federally-mandated, employer-sponsored, employee-paid benefits; they cannot be regarded as employer-provided benefits.

This modest safety net cannot be construed as a health-insurance ceiling. COBRA, as the language of section 603 suggests, contemplates that employees, who otherwise suffer a qualifying event, may nevertheless not be eligible for COBRA coverage because they continue to receive health insurance benefits from other sources. It appears, therefore, that COBRA can co-exist with the Equity Amendment Act, as well as with other state continuation-of-coverage laws and with ERISA-covered plans providing continuation-of-coverage benefits independently of COBRA.

Thus, the Internal Revenue Service, which is charged with enforcing ERISA and COBRA, has expressed its view that state laws governing health insurance continuation coverage can co-exist with COBRA. In proposed regulations, consisting in part of questions and answers formulated by the IRS, the IRS has stated:

> **Question 41**: If coverage is provided to a qualified beneficiary after a qualifying event without regard to COBRA coverage (e.g., *as a result of state or local law*, industry practice, a collective bargaining agreement, or plan procedure), will such alternative coverage extend the maximum coverage period?
>
> **Answer 41**: (a) The alternative coverage will not extend the maximum coverage period. The end of

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"require the payment of benefits to persons unable to work because of nonoccupational injuries and illnesses, such as pregnancy." U.S. Br. 20. COBRA, however, does not limit "qualifying events" to those occurring in the workplace. Furthermore, if a qualifying event is defined as broadly as the United States otherwise suggests, it would appear that pregnancy, if it resulted in a reduction of hours, could be a qualifying event and thereby potentially trigger COBRA coverage.

> the maximum coverage period is measured solely from the date of the qualifying event, as described in Q&A-39 and Q&A-40 of this section.
>
> (b) If the alternative coverage does not satisfy all the requirements for COBRA continuation coverage, the group health plan covering the qualified beneficiary immediately before the qualifying event is not in compliance with section 162 (k) *unless the qualified beneficiary receiving the alternative coverage was also offered the opportunity to elect COBRA continuation coverage and rejected COBRA continuation coverage in favor of the alternative coverage.* . . .

52 Fed. Reg. 22730 (June 15, 1987) (emphasis in text added).[16] According to the IRS, therefore, COBRA contemplates the continuing validity of state continuation-of-coverage laws and does not outlaw state measures to impose on employers obligations different from and/or greater than those imposed by COBRA.[17] Employers may thus be required to offer employees COBRA coverage as well as continuation of coverage benefits mandated by state law, and employees may elect the option or options that they believe to be in their best interest.

There is not, therefore, as the United States argues, (U.S. Br. 21-24) any conflict between COBRA and the Equity Amendment Act or any other appropriately crafted state continuation-of-coverage law. Employers must offer COBRA coverage to qualifying workers; employers must offer Equity Amendment coverage to workers entitled to receive workers' compensation; and, pursuant to ERISA, employers must offer any continuation of coverage they have voluntarily established in their ERISA-covered plans on the terms set forth in those plans. See D.C. Br. 18. Workers are free

[16] Although the proposed IRS Regulations have not become effective yet, the District believes that the Court may find them useful in evaluating the arguments of counsel for the Department of Labor and the United States that COBRA is an impediment to the Equity Amendment Act.

[17] For a discussion of state continuation-of-coverage laws, see Employer's Handbook: Mandated Health Benefits (Thompson Publishing Group 1992).

to select any or all of the options for which they are eligible, although if they do elect COBRA coverage, employers may require them to pay for it — for both the premium and the expenses of administration.[18]

The argument of the United States must be rejected for another reason. Adoption of the argument that COBRA, in conjunction with the other provisions of ERISA at issue in this case, preempts the Equity Amendment Act would also require preemption of the medical and related-services component of every state workers' compensation law in this country.

The basic District workers' compensation law, like those of the states, requires employers, by insurance or otherwise, to pay for the medical and related costs to treat the injury or illness that rendered the employee eligible for workers' compensation. Such employee benefits are employee welfare benefits within the meaning of ERISA. Such provisions, moreover, are the type of workers' compensation law that even the D.C. Circuit would rule clearly survive preemption under ERISA.

Under the argument of the United States, a ruling preempting the Equity Amendment Act because it requires health benefits other than those which an employer must offer

[18] The United States thus errs in urging that "[i]t would conflict with Congress's purpose in adding a broad preemption provision to ERISA, as well as with the language of Section 514(a), to hold that a private employer sponsoring a health benefit plan is subject to conflicting requirements concerning continuation coverage *under the plan*." U.S. Br. 9 (emphasis added). The Equity Amendment Act is not in conflict with ERISA, even as amended by COBRA, and does not impose any conflicting requirements on ERISA-covered plans. The United States also erroneously asserts that the Equity Amendment Act has made "unenforceable" COBRA's provision requiring employers to give their employees the option of having COBRA coverage but permitting employers "to adopt plans that require employees to assume the cost of continuation coverage under health care plans." U.S. Br. 22. The basic requirement of COBRA is that employers offer their employees an option in their ERISA plans. Even with the Equity Amendment Act, employers may still offer employee-paid COBRA coverage to their employees who suffer a qualifying event that results in the loss of their health-care coverage, and employees are free to accept or reject such coverage. The Equity Amendment Act imposes a distinct workers' compensation requirement.

pursuant to COBRA, would also require preemption of the "free-standing" workers' compensation law approved by the D.C. Circuit. It would thus require preemption of workers' compensation provisions requiring employers to pay for the care of employee on-the-job injuries or illnesses.[19]

This is a result that Congress surely did not intend when it enacted COBRA. Congress, by requiring employers to give employees the option to pay for their own health insurance, could not have intended to relieve employers from having to provide medical benefits to injured workers required by state workers' compensation laws, unless, of course, Congress perpetrated a cruel hoax on American workers when it enacted COBRA.

In short, COBRA establishes a modest health insurance safety net, which, at the option of employers, may be fully financed by those who elect COBRA coverage. COBRA cannot be interpreted as precluding the states and the District of Columbia from providing a more secure safety net, financed in whole or in part by employers, either through their workers' compensation law or through insurance laws saved by section 514(b) of ERISA, 29 U.S.C. § 1144(b). See *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990); *Metropolitan Life Insurance Co. v. Massachusetts, supra*. This more secure safety net may include a requirement that employers, by insurance or otherwise, pay the expenses necessary to treat the injury rendering an employee eligible for workers' compensation, and it may also include a requirement that employers, by insurance or otherwise, provide medical

[19] Presumably this would be true at least to the extent that injuries or illnesses rendering an employee eligible for workers' compensation also would make an employee eligible for COBRA coverage. If the argument of the United States is so limited, it would make a patchwork of workers' compensation programs, depending on the number of employees an employer has and on whether an injury or illness rendering a worker eligible for workers' compensation also constitutes a qualifying event. If the argument of the United States is not so limited, it would eliminate workers' compensation medical and related benefits even for workers not eligible for COBRA coverage.

benefits that an employee would otherwise lose because of that injury.[20]

[20] The District notes one further matter. The United States seems to meld traditional preemption analysis under the Supremacy Clause with preemption analysis under section 514(a) of ERISA. This Court has recently ruled, however, that when Congress has enacted an express preemption provision in legislation, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Cipollone v. Liggett Group, supra*, 60 U.S.L.W. at 4707 (internal quotation marks and citation omitted).

For the reasons that follow, under either pre-emption approach, the Equity Amendment Act is valid even with consideration of COBRA. Thus, if the subsequently enacted COBRA is considered separate from those provisions of ERISA that have been the focus of this case, it is not invalid under traditional Supremacy Clause analysis. The Equity Amendment Act does not actually conflict with COBRA. *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983). Nor can COBRA be said to so completely occupy the field " 'as to make reasonable the inference that Congress left no room for the States to supplement it . . .' " *Fidelity Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

If, on the other hand, COBRA is considered an integral part of ERISA because it amends and adds to the subchapter in which section 514(a) is found, it still cannot be said that the Equity Amendment Act is preempted either because (1) pursuant to *Shaw*, an employer may comply with the Equity Amendment Act by establishing or amending a plan separate from its ERISA-covered plan; and (2) the Equity Amendment Act still would not "relate to" ERISA-covered plans within the meaning of section 514(a). The fact that some ERISA-covered plans must contain federally mandated continuation of coverage benefits does not change the substance of section (4)(b)(3), and the reference to section 4(b)(3) in section 514(a), or the relationship between the Equity Amendment Act and ERISA-covered plans. Insofar as COBRA is concerned, section 514(a) would require invalidation of a state workers' compensation law only if (1) the state sought to enforce its law by requiring employers to alter their ERISA-covered plans; or (2) if the law dealt with COBRA's minimum employer-sponsored continuation-of-coverage options for employees by regulating the content or administration of an employer's COBRA obligations. Neither the Equity Amendment Act nor the District's requirement that employers pay the costs of treating their employees' job-related injuries has any of these effects.

CONCLUSION

Workers' compensation statutes necessarily require the provision of employee welfare benefits within the meaning of ERISA, and plans that provide such benefits would be governed by ERISA were there no exemption for employee welfare benefit plans maintained solely for the purpose of complying with a state workers' compensation law. A workers' compensation statute cannot be invalid because it requires employee welfare benefits, although ERISA would preempt such a statute "insofar as" a state sought to enforce it by requiring employers to alter their ERISA-covered plans or by otherwise interfering with the content or administration of such plans.

The Equity Amendment Act leaves it to employers to determine the content and administration of their ERISA-covered plans. Employers can comply with the Equity Amendment Act by establishing or amending an ERISA-exempt workers' compensation plan that is separate from any ERISA-covered plan they may have.[21] The Equity Amendment Act is not, therefore, preempted even if it "relates to" ERISA-covered plans.

In the alternative, the Equity Amendment Act is not preempted because it does not "relate to" ERISA-covered plans within the meaning of ERISA. The relationships between the Equity Amendment Act and ERISA-covered plans identified by the court below are too tenuous to require preemption. ERISA's preemptive reach does not extend to statutes, such as workers' compensation laws, simply because they require employee medical benefits to be paid as compensation for on-the-job injury and require an employer to establish an administrative scheme, and thus increase an employer's cost of doing business in a particular jurisdiction. Furthermore, the fact that the Equity Amendment Act uses existing employee benefits to determine eligibility for benefits and the level of benefits does not bring into play any additional ERISA concerns.

[21] As the Board of Trade concedes, ERISA " '*does not remove state jurisdiction over plans not subject to the Act.*' " Board of Trade Br. 20, quoting S. Rep. No. 93-127, 93d Cong. 1st Sess. 38 (1973) (emphasis supplied by Board of Trade)

In short, the Equity Amendment Act is a workers' compensation law that seeks to take into account modern compensation practices. It does not offend either ERISA or COBRA.[22]

This Court should reverse the decision of the District of Columbia Circuit.

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[22] Had the Equity Amendment Act done so, Congress had the authority to disapprove it. See D.C. Br. 4 n.2. Congress, which often keeps what the District believes to be a too watchful eye on its purely internal affairs, declined to exercise that authority although the Act plainly deals with employee welfare benefit plans as do ERISA and COBRA.